INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
A. The Board's decision	2
B. The decision of the court of appeals	9
Argument	9
Conclusion	12

CITATIONS

Cases:	
National Labor Relations Board v. *Gala-Mo Arts, Inc.*, 232 F. 2d 102	10
National Labor Relations Board v. *Globe Wireless, Inc.*, 193 F. 2d 748	10
National Labor Relations Board v. *Herman Sausage Co.*, 275 F. 2d 229	12
National Labor Relations Board v. *Andrew Jergens Co.*, 175 F. 2d 130, certiorari denied, 338 U.S. 827	12
National Labor Relations Board v. *Katz*, 369 U.S. 736	11
National Labor Relations Board v. *Southern Materials Co.*, 345 F. 2d 240	10
National Labor Relations Board v. *Vapor Blast Manufacturing Co.*, 287 F. 2d 402, certiorari denied, 368 U.S. 823	10
Trojan Freight Lines, Inc. v. *National Labor Relations Board*, 356 F. 2d 947	10
Statutes:	
National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*):	
Section 8(a)(1)	8
Section 8(a)(3)	8
Section 8(a)(5)	8, 11

291-005—68

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1043

SAFWAY STEEL SCAFFOLDS COMPANY OF GEORGIA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–16a) is reported at 383 F. 2d 273. The Board's decision and order (Pet. App. 25a–48a) are reported at 153 NLRB 417.

JURISDICTION

The opinion of the court of appeals was issued on September 7, 1967, and a petition for rehearing was denied on October 24, 1967 (Pet. App. 1a, 17a). The court's decree was entered on November 8, 1967 (Pet. App. 18a–24a). The petition for a writ of certiorari was filed on January 22, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly found that the Company was not prejudiced by the Trial Examiner's denial of its motions to take pretrial depositions.

2. Whether the Board properly concluded that the Company violated the National Labor Relations Act by, *inter alia,* unilaterally reducing employees' wages before a *bona fide* impasse in contract negotiations had been reached.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition, pp. 51a–52a.

STATEMENT

A. THE BOARD'S DECISION

1. On March 26, 1964,[1] the Union[2] notified petitioner Company that it wished to renegotiate the parties' collective bargaining agreement, scheduled to expire on May 31 (Pet. App. 29a–30a; R. 82a; J.A. 103–104).[3] John E. Wallace, petitioner's manager, replied that no date for negotiations could be set before late April or early May, but that, if the Union wished to "save

[1] All dates are in 1964.

[2] Aircraft and Engine Maintenance and Overhaul, Building and Construction Manufacturing, Processing and Distribution and Allied Industries Employees, Local 290, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

[3] "R." refers to Volume I, Transcript of Record, and "J.A." refers to the Joint Appendix, filed in the court below.

negotiation time and expense," the Company would consider "extend[ing] the existing contract for one year" (Pet. App. 30a, R. 8a; J.A. 104–105). Wallace added that, if the Union found such an extension not agreeable, it should forward to the Company any other proposals it might have (Pet. App. 30a; R. 82a; J.A. 104–105). On April 14, the Union submitted a written proposal to the Company which requested: 1) a reduction of the probationary period from 90 days to 30 days; 2) one additional paid holiday; 3) a sick leave allowance of one day each month; 4) paid vacations of three weeks after six years of service; and 5) a wage increase of 20 cents "across the board" (Pet. App. 31a–32a; R. 84; J.A. 106–107).

At a preliminary meeting on May 4 the parties merely agreed to meet again on May 20 (Pet. App. 32a; R. 84–85; J.A. 75–76). On May 15, Manager Wallace, who had attended the May 4 meeting, assembled all of his employees and read them the existing Union contract (Pet. App. 32a–33a; R. 85; J.A. 445–446). He told the employees that he was not getting enough work out of them and that he could be a "bastard" if he wanted to be (Pet. App. 33a; R. 85; J.A. 45–46, 57–58). Finally, Wallace stated that he was "getting rid of the Union" and that no Union officials could come into the plant again (Pet. App. 33a; R. 85; J.A. 45–46, 57–58).

At the next bargaining session, on May 21, the parties discussed the Union's proposal of a uniform wage increase of 20 cents an hour (Pet. App. 33a; R. 85; J.A. 15, 22). The Company contended that it

could not agree to this demand since it was already paying more than its competitors (whom it did not identify) (Pet. App. 33a; R. 85–86; J.A. 22, 35–36.) The parties agreed to meet again the following week, when the Company would submit a counterproposal (Pet. App. 33a; R. 86; J.A. 15–16, 21–22, 107).

On May 28, the Company submitted a proposed contract to the Union (Pet. App. 33a; R. 86; J.A. 16). In place of its earlier offer to continue the existing contract for one year, the Company proposed to cut the existing wages of warehousemen by 29 cents (from $1.74 to $1.45 per hour) and those of truckdrivers by 15 cents (from $1.90 to $1.75 per hour), and to reduce or eliminate other employee benefits and working conditions then in effect (Pet. App. 33a; R. 86; J.A. 16, 107–139). The Union asked that it be given an opportunity to study these proposals (Pet. App. 33a–34a; R. 86; J.A. 16).

On June 15, the Company wrote the Union that unless it responded to the Company's proposals the Company would terminate the old contract and change the wage rates on July 1 (J.A. 143–144). When the parties met on June 17 the Union abandoned all of its prior proposals for changes in the expired contract and instead proposed a wage increase of 10 cents per hour (Pet. App. 34a; R. 86; J.A. 17–18). The Company refused to accept this offer and insisted that its roll-back counterproposal of May 28 be accepted without change (Pet. App. 34a; R. 86; J.A. 17). The meeting was adjourned without agreement (Pet. App. 34a; R. 86; J.A. 17–18).

Shortly after the June 17 meeting, Manager Wallace called Union Steward Frank E. Cogdel into his office and told him that the only way that the Company could give the employees more money was for them to "get out of the Union" (Pet. App. 34a; R. 86–87; J.A. 47). Wallace added that the employees were not to worry about being "cut a penny in pay" because the Company president had "a lot of money." Wallace also stated that, when the president said he would get rid of the Union, he would. (Pet. App. 34a–35a; R. 87; J.A. 47.) Cogdel told Wallace that he would talk to the men, but that he could not make up their minds for them (Pet. App. 35a; R. 87; J.A. 47–49).

At the negotiating session on June 29, the Company offered to reduce its proposed cut in wages by five cents, thereby proposing a wage rate of $1.50 for warehousemen and $1.80 for drivers (Pet. App. 35a; R. 87–88; J.A. 25–30). However, the Company made no change in its proposal to reduce other employee benefits (Pet. App. 35a; R. 88; J.A. 25–29). The Union representatives stated that they were very dubious that the men would accept such a proposal, but that it would be presented at the Union meeting to be held that night (Pet. App. 35a; R. 88; J.A. 25–30).

Later in the day, Manager Wallace asked Union Steward Cogdel what the men thought about the Company's latest wage offer (Pet. App. 35a; R. 88; J.A. 49). When Cogdel replied that the men did not want a cut in wages, Wallace reminded him of his previous

assurance that the Company was "not going to cut them a penny" (Pet. App. 35a; R. 88; J.A. 49), but Wallace also explained that they did not "need the Union in here," and that, if it were ousted, management and the employees could "get together and work like one happy family" (Pet. App. 35a; R. 88; J.A. 49). Wallace then gave Cogdel his telephone number and asked that after the Union meeting Cogdel call and tell him what had happened (Pet. App. 35a; R. 88; J.A. 50). That night, Cogdel called Wallace and informed him that the men had rejected the Company's offer and had voted to strike on July 1 (Pet. App. 35a–36a; R. 88; J.A. 50–51).

The Company and the Union representatives met again briefly on June 30, at which time the Company was formally notified of the strike scheduled for the following day (Pet. App. 36a; R. 88; J.A. 30–31, 38). The Company's representative stated that, irrespective of what the Union might do, the previously announced reduction in pay would go into effect on July 1 (Pet. App. 36a; R. 88; J.A. 39).

On July 1, six of the Company's eight employees went on strike[4] (Pet. App. 36a; R. 89; J.A. 41). The

[4] Employee Quincy Knox, who had been in the hospital at the time of the strike, returned to the plant on July 6, and was told by Manager Wallace that his pay had been reduced from $1.74 to $1.45 per hour (Pet. App. 38a; R. 90–91; J.A. 63–64). When Knox objected to this cut in pay, Wallace told him that the Union was no longer in the plant, and that Knox could consider the dues that he formerly paid the Union to be additional take-home pay (Pet. App. 38a; R. 91; J.A. 63–65). Knox thereupon joined the other strikers (Pet. App. 38a; R. 91; J.A. 65–66).

Company immediately sent letters to each of the six employees, stating that unless the employee returned to work by July 6 he would be discharged as of that date (Pet. App. 38a; R. 91; J.A. 43, 139–140). None of the employees returned to work, and, on July 6, each received a notice that he had been replaced and was "officially discharged" (Pet. App. 38a; R. 91; J.A. 141).

On August 6 and again on August 13, a federal mediator called the parties together in an effort to settle the dispute (Pet. App. 36a; R. 89; J.A. 31–32). At the first of these meetings, the Union offered to reduce its wage demands to a five cent increase over the pre-July 1st rates (Pet. App. 36a; R. 89; J.A. 32). The Company countered by withdrawing its offer of June 29 to reduce by five cents the proposed cut in wages. The Company thus returned to rates of $1.45 for warehousemen and $1.75 for drivers, a scale which it had first proposed on May 28 and which it had in fact unilaterally established on July 1 (Pet. App. 36a; R. 89; J.A. 32). On August 13, the mediator, after meeting with the Union separately, told the Company that he felt positive that the Union would accept a contract with the same terms as the expired contract (Pet. App. 36a; R. 89; J.A. 32–33). The Company refused this offer (Pet. App. 37a; R. 89; J.A. 33). No further meetings were held (Pet. App. 37a; R. 89; J.A. 33).

2. After the union filed its charges (R. 13–16, 18–28), the General Counsel issued a complaint against the Company (R. 30–38), and these unfair labor practice proceedings ensued. Shortly before the hearing

was to be held, the Company filed motions to take oral depositions and written interrogatories of the employees referred to in the complaint. The depositions were sought on the general ground that they were "necessary for [the Company] properly to prepare its defense" (R. 53–54), and the application to submit written interrogatories was based on the assertion that such a course would be "in accordance with Rule 31, Federal Rules of Civil Procedure" (R. 60–61). The trial examiner denied both of these motions on the ground that the National Labor Relations Act does not authorize pretrial discovery (R. 59–60, 64).

3. On the basis of the evidence set forth above, pp. 2–7, the Board found[5] that the Company, by its entire course of conduct during the negotiations, failed to bargain in good faith with the Union, in violation of Section 8(a) (5) and (1) of the Act (Pet. App. 25a–26a, 37a–38a, 40a). The Board rejected the Company's contention that its unilateral institution of a wage cut was permissible, because the evidence showed that no genuine impasse in the bargaining negotiations had occurred (Pet. App. 36a, 26a, n. 3).[6] The Board's

[5] On exceptions by the Company (R. 101–109), the Board adopted the findings, conclusions, and recommendations of the trial examiner (R. 116–117).

[6] The Board also found that the Company, by its unlawful refusal to bargain in good faith, caused the strike of July 1; that the strikers were therefore engaged in an unfair labor practice strike, and thus were entitled to reinstatement upon unconditional application; and that the Company's refusal to grant reinstatement upon such application constituted discrimination against the strikers, in violation of Section 8(a) (3) and (1) of the Act (Pet. App. 25a–26a, 38a–39a, 40a). The Company does not here contest these additional findings.

order, *inter alia,* required the Company to bargain with the Union upon request and to embody any understanding reached in a signed agreement. The order further required the Company to revoke the unilateral wage scale adopted on July 1, 1964, and to restore the wage scale and benefits existing immediately prior to that date (Pet. App. 26a–27a, 43a–45a).

The Board also affirmed the trial examiner's rulings denying discovery (R. 101, 116–117).

B. THE DECISION OF THE COURT OF APPEALS

The court of appeals held that the Board's unfair labor practice findings were supported by substantial evidence (Pet. App. 10a–14a). The court further concluded that, although the examiner had erred in holding that the Act does not authorize pre-hearing discovery, his denial of the Company's request to take the depositions of its employees did not prejudice it (Pet. App. 4a–9a). Accordingly, the court enforced the Board's order (Pet. App. 14a–16a).[7]

ARGUMENT

1. The principal issue petitioner raises (Pet. 11–14)—whether the National Labor Relations Act authorizes the use of pre-hearing discovery—is not presented by this case, for the court of appeals agreed

[7] The court refused to enforce that part of the Board's order which required the Company to refrain from violating Section 7 of the Act "in any manner" (Pet. App. 14a–16a). In the court's view, there was "no showing of a proclivity to violate the Act" and therefore, the court ruled, this broad provision in the order was inappropriate in the circumstances of this case (Pet. App. 16a).

with petitioner that the Act authorizes "a trial examiner to permit the taking of depositions in any case where such a procedure would be practical" (Pet. 4a).[8] It held, however, that the examiner's refusal to permit the Company to take depositions was a mere "technical error which did not result in prejudice to [the Company's] case" (*id.* 6a). The correctness of this latter ruling presents no issue warranting further review, since whether a particular denial of pre-trial discovery was prejudicial necessarily turns upon the

[8] In rejecting a claim that the Board's refusal to permit the taking of pre-hearing depositions denied an employer procedural due process, the Ninth Circuit has stated: "There is no provision in the Act authorizing the use of the discovery procedure." *National Labor Relations Board* v. *Globe Wireless, Inc.*, 193 F. 2d 748, 751. Two courts of appeals have ruled that it lies within the Board's discretion to decide whether to permit the taking of depositions. *Trojan Freight Lines, Inc.* v. *National Labor Relations Board*, 356 F. 2d 947, 948 (C.A. 6); *National Labor Relations Board* v. *Gala-Mo Arts, Inc.*, 232 F. 2d 102, 106 (C.A. 8). The Board's practice is to permit the taking of depositions only where necessary to perpetuate testimony; and to deny access to employees' statements made to Board agents in pre-trial investigations unless and until the employees testify at the hearing. The latter practice was upheld in *National Labor Relations Board* v. *Vapor Blast Manufacturing Co.*, 287 F. 2d 402, 407–408 (C.A. 7), certiorari denied, 368 U.S. 823.

In *National Labor Relations Board* v. *Southern Materials Co.*, 345 F. 2d 240, 244 (C.A. 4), which petitioner erroneously asserts to be in conflict with the decision below (Pet. 12–13), the court stated in dictum that the Board "should freely permit discovery * * *." The actual holding was that the Board's order was invalid on the merits, and the court stated that it therefore found it unnecessary to decide whether the company was entitled to have the Board's General Counsel answer pre-hearing interrogatories.

facts of the individual case and does not involve any issue of general importance.

Moreover, the court of appeals correctly ruled that no prejudice resulted here. The court noted (*ibid.*) that the finding of an unfair labor practice rested largely on statements by Wallace "which tended to undermine the union" and on a "unilateral reduction in wages before a bargaining impasse had been reached." The court properly concluded (*id.* 6a–7a) that the latter event was determined by looking to the undisputed chronology of events, upon which pretrial discovery could "not have shed a different light"; and that, if the Company had any basis for discrediting the statements attributed to Wallace, it could have called the employees who were said to have heard them, or cross-examined the witnesses called by the General Counsel, or introduced rebuttal testimony.

2. There is no merit to the Company's contention (Pet. 15–16) that the court of appeals misapplied this Court's holding in *National Labor Relations Board* v. *Katz,* 369 U.S. 736, when it upheld the Board's finding on the merits that the Company violated Section 8(a)(5) of the Act by unilaterally reducing its employees' wages. It is undisputed (Pet. 15) that *Katz* permits an employer to make a unilateral change in the terms of employment under negotiation only after a *bona fide* impasse in the bargaining has been reached. In the instant case, the Board found on the basis of substantial evidence that, when the Company put its wage reduction into effect on July 1, the parties had not in fact reached an impasse on wages, as the subsequent

negotiations on that issue with the mediator confirmed (Pet. App. 36a; *supra*, p. 7). Moreover, even if there was an impasse on July 1, it was not a *bona fide* one, since it had been induced by the Company's prior bad faith bargaining (Pet. App. 26a, n. 3). The court below sustained these Board findings (Pet. App. 12a–13a). An employer's unilateral change of wages in these circumstances is an unfair labor practice. *National Labor Relations Board* v. *Herman Sausage Co.*, 275 F. 2d 229, 231–232 (C.A. 5); *National Labor Relations Board* v. *Andrew Jergens Co.*, 175 F. 2d 130, 136 (C.A. 9), certiorari denied, 338 U.S. 827.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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